UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

ARAGON CAPITAL MANAGEMENT, LLC, et al.

Defendants.

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07 Civ. 919 (FM)

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANTS ZVI ROSENTHAL, AMIR ROSENTHAL, AYAL ROSENTHAL AND OREN ROSENTHAL AND RELIEF DEFENDANTS EFRAT ROSENTHAL AND RIVKA ROSENTHAL

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TABLE OF CONTENTS

Page

Table of Authorities iii

Preliminary Statement 1

Statement of Facts 3

Standard of Review 3

ARGUMENT 4

I. ZVI, AMIR AND AYAL ADMIT THAT THEY VIOLATED THE ANTI-FRAUD PROVISIONS OF THE EXCHANGE AND SECURITIES ACTS 4

A. Zvi and Amir Each Violated Section 10(b), Rule 10b-5 and Section 17(a) in Connection with Taro's July 2004 Quarterly Earnings Announcement 5

1. Zvi Is Liable as a Trader and as Amir's Tipper Under the Classical Theory 6

2. Amir Is Liable as Zvi's Tippee and as Heyman's Tipper Under the Classical Theory 9

B. Zvi and Amir Each Violated Section 10(b) and Rule 10b-5 in Connection with Taro's May 2001 Announcement of FDA Approval of CB Cream 11

1. Zvi Is Liable as Amir's Tipper Under the Classical Theory 12

2. Amir Is Liable as Zvi's Tippee Under the Classical Theory 13

C. As They Concede, Ayal and Amir Violated Section 10(b), Rule 10b-5 and Section 17(a) in Connection with Project Victor and Project AA 14

II. DEFENDANTS ZVI, AMIR AND AYAL SHOULD BE PERMANENTLY ENJOINED FROM FURTHER VIOLATIONS OF THE SECURITIES LAWS 16

III. DEFENDANTS ZVI, AMIR, AYAL AND OREN AND RELIEF DEFENDANTS EFRAT AND RIVKA SHOULD BE ORDERED TO DISGORGE THE AMOUNTS EARNED FROM THE UNLAWFUL TRADING 20

A. The Illegal Profits Should Be Disgorged 21

B. Zvi and Amir Are Each Jointly and Severally Liable for the Trading Profits of Their Tippees 23

C. Ayal, Oren, Efrat and Rivka Are Each Liable for 20% of Aragon's Illegal Profits Earned in Connection with Taro's July 2004 Quarterly Earnings Announcement 23

IV. PREJUDGMENT INTEREST SHOULD BE ORDERED ON THE DISGORGED AMOUNTS 26

V. CIVIL PENALTIES SHOULD BE ORDERED AGAINST ZVI, AMIR AND AYAL 27

A. Maximum Penalties Under ITSFEA Should Be Ordered Against Zvi and Amir for Their Violations in Connection with Taro's July 2004 Earnings Announcement 27

B. Third-Tier Penalties Under Section 21(d)(3) of the Exchange Act Should Be Ordered Against Amir for His Violations in Connection with His Project Victor and Project AA Trading and Against Ayal for His Violations in Connection with Project Victor 29

1. Section 21(d)(3) Applies to Amir's and Ayal's Violations in Connection with Projects Victor and AA 30

2. Third-Tier Penalties Are Appropriate 31

VI. THE COURT SHOULD BAR ZVI FROM SERVING AS AN OFFICER OR DIRECTOR OF A PUBLIC COMPANY 33

VII. FINAL JUDGMENT SHOULD BE ENTERED 34

CONCLUSION 38

TABLE OF AUTHORITIES

Page

Cases

Capital Distrib. Servs., Ltd., v. Ducor Express Airlines, Inc., 462 F. Supp. 2d 354 (E.D.N.Y. 2006) 37

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 35

Dirks v. SEC, 463 U.S. 646 (1983) 6-7, 9, 13, 16

Ginett v. Computer Task Group, 962 F.2d 1085 (2d Cir. 1992).................... 34-35, 36

Kuehnert v. Texstar Corp., 412 F.2d 700 (5th Cir. 1969)....................30

Lankler Siffert & Wohl, LLP, v. Rossi, 02 Civ. 10055 (RWS), 2004 WL 541842 (S.D.N.Y. Mar. 19, 2004) aff'd, 125 F. App'x 371 (2d Cir. 2005) 36

Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574 (1986)....................3

Nat'l Ass'n of Life Underwriters, Inc. v. Comm'r, 30 F.3d 1526 (D.C. Cir. 1994)............3

SEC v. Antar, 831 F. Supp. 380 (D.N.J. 1993).................... 24-25

SEC v. Berger, 244 F. Supp. 2d 180 (S.D.N.Y. 2001), aff'd, 322 F.3d 187 (2d Cir. 2003)....................4, 17, 18

SEC v. Cavanaugh, 155 F.3d 129 (2d Cir. 1998) 17, 23-24

SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90 (2d Cir. 1978) 16

SEC v. Drexel Burnham Lambert Inc., 837 F. Supp. 587 (S.D.N.Y. 1993)....................33

SEC v. Falbo, 14 F. Supp. 2d 508 (S.D.N.Y. 1998) 28

SEC v. First City Fin. Corp., Ltd., 890 F.2d 1215 (D.C. Cir. 1989)....................21

SEC v. First Jersey Sec., Inc., 101 F.3d 1450 (2d Cir. 1996)....................27

SEC v. Freeman, 290 F. Supp. 2d 401 (S.D.N.Y. 2003) 18, 20, 28

SEC v. Glauberman, No. 90 Civ. 5205 (MBM), 1992 WL 175270 (S.D.N.Y. July 16, 1992)....................24, 25

SEC v. Grossman, 887 F. Supp. 649 (S.D.N.Y. 1995),
aff'd sub nom. SEC v. Estate of Hirshberg, 101 F.3d 109 (2d Cir. 1996)..................20, 23

SEC v. Haligiannis, 470 F. Supp. 2d 373 (S.D.N.Y. 2007).. 26-27

SEC v. Lipson, 278 F.3d 656 (7th Cir. 2002).. 28-29

SEC v. Manor Nursing Ctrs., 458 F.2d 1082 (2d Cir 1972)..16, 21

SEC v. Martino, 255 F. Supp. 2d 268 (S.D.N.Y. 2003)...24

SEC v. Materia, 745 F.2d 197 (2d Cir. 1984)...23

SEC v. McCaskey, No. 98 Civ. 6153 (SWK),
2001 WL 1029053 (S.D.N.Y. Sept. 6, 2001)..20, 34

SEC v. McCaskey, No. 98 Civ. 6153 (SWK)(AJP),
2002 WL 850001 (Mar. 26, 2002).. 30-31

SEC v. Michel, No. 06 C 3166, 2008 WL 516369 (N.D. Ill. Feb. 22, 2008)....................32

SEC v. Monarch Funding Corp., 192 F.3d 295 (2d Cir. 1999) 4, 5

SEC v. Moran, 944 F. Supp. 286 (S.D.N.Y. 1996)... 26-27

SEC v. Musella, 748 F. Supp. 1028 (S.D.N.Y. 1989),
aff'd, 898 F.2d 138 (2d Cir. 1990)...16

SEC v. Opulentica, LLC, 479 F. Supp. 2d 319 (S.D.N.Y. 2007).....................................21

SEC v. Patel, 61 F.3d 137 (2d Cir. 1995) 21, 33

SEC v. Sekhri, No. 98 Civ. 2320(RPP),
2002 WL 31100823 (S.D.N.Y. July 22, 2002)..18, 28

SEC v. Sekhri, 333 F. Supp. 2d 222 (S.D.N.Y. 2004)..3

SEC v. Stephenson, 732 F. Supp. 438 (S.D.N.Y. 1990)..26

SEC v. Svoboda, 409 F. Supp. 2d 331 (S.D.N.Y. 2006) 18, 20, 28

SEC v. The Better Life Club of Am., Inc., 995 F. Supp. 167 (D.D.C. 1998),
aff'd, 203 F.3d 54 (D.C. Cir. 1999) 26

SEC v. Tome, 833 F.2d 1086 (2d Cir. 1987)..21

SEC v. Warde, 151 F.3d 42 (2d Cir. 1998)..7, 9, 13, 23, 26

SEC v. Zwick, No. 03 Civ. 2742 (JGK),
2007 WL 831812 (S.D.N.Y. Mar. 16, 2007),
aff'd, No. 07-2088, 2008 WL 4104233 (2d Cir. Aug. 27, 2008)................................ 31-32

United States v. B.C.F. Oil Refining Inc., CV-05-0562,
2007 WL 81933 (E.D.N.Y. Jan. 9, 2007) 35

United States v. Carpenter, 791 F.2d 1024 (2d Cir. 19856..30

United States v. O'Hagan, 521 U.S. 642 (1997)..16, 17

Statutes, Regulations and Rules

Securities Act of 1933

Section 17(a), 15 U.S.C. § 77q(a)... passim

Securities Exchange Act of 1934

Section 10(b), 15 U.S.C. § 78j(b) .... passim

Rule 10b-5, 17 C.F.R. § 240.10b-5 .... passim

Section 21A (Insider Trading and Securities Fraud
Enforcement Act)

15 U.S.C. §§ 78u-1(a)(1) & (a)(2)... 27-28, 30

15 U.S.C. § 78u-1(d)(5)...28

Section 21(d)(2), 15 U.S.C. § 78u(d)(2)..33

Section 21(d)(3), 15 U.S.C. § 78u(d)(3)..29, 30, 31

17 C.F.R. § 201.1002, Table II to Subpart E..31

Fed. R. Civ. P. 8(d) 3

Fed. R. Civ. P. 54(b) 34, 35, 36, 37

Fed. R. Civ. P. 56(c) 3-4

Fed. R. Evid. 801(d)(2) 3

Fed. R. Evid. 801(d)(2)(C) 4

Fed. R. Evid. 801(d)(2)(D) 4

Fed. R. Evid. 803(22) 3, 12

Miscellaneous

H.R. Rep. No. 98-355, 98th Cong., 2d Sess., 7-8 (1984) 28

S. Rep. No. 337, 101st Cong., 2d Sess. 22, at 22 (1990) 33

SEC v. Tsao, AW-03-1596 (D. Md.), Lit. Rel. No. 18889,
83 SEC Docket 2460, 2004 WL 2076220 (Sept. 17, 2004) 30

SEC v. Schuster, No. 00 Civ. 8822, Lit. Rel. No. 16939,
2001 WL 278472 (Mar. 22, 2001) 30

Plaintiff Securities and Exchange Commission (the "Commission") respectfully submits this Memorandum of Law in Support of its Motion for Partial Summary Judgment against Defendants Zvi Rosenthal ("Zvi"), Amir Rosenthal ("Amir"), Ayal Rosenthal ("Ayal") and Oren Rosenthal ("Oren") and Relief Defendants Efrat Rosenthal ("Efrat") and Rivka Rosenthal ("Rivka").

PRELIMINARY STATEMENT

On February 8, 2007, Defendants Zvi, Amir and Ayal and former Defendant David Heyman each pled guilty to conspiracy to commit securities fraud. In their plea allocutions, they admitted facts that establish the Defendants' liability as to some of the claims alleged in the Commission's Amended Complaint in this action ("Complaint"). These admissions concerned four distinct episodes of insider trading: (a) trading in advance of the July 2004 quarterly earnings announcement of Taro Pharmaceutical Industries, Ltd. (together with subsidiaries, "Taro"), based on a tip from Zvi, a Taro executive; (b) trading in advance of Taro's May 2001 announcement of the approval by the United States Food and Drug Administration ("FDA") of Taro's application to distribute generic drug Clotrimazole/Betamethasone Dipropionate Cream USP ("CB Cream"), also based on Zvi's tip; (c) trading based on Ayal's tip about confidential merger negotiations, known as Project Victor, that Ayal learned about in connection with his job at the accounting and consulting firm PriceWaterhouseCoopers ("PwC"); and (d) trading based on Heyman's tip about confidential merger negotiations, known as Project AA, that Heyman learned about in connection with his job at the accounting and consulting firm Ernst & Young ("E&Y"). Zvi, Amir, Ayal and Heyman subsequently confirmed their plea admissions in their Answers to the Complaint, and Zvi and Amir confirmed and elaborated on their respective admissions in their responses to the Commission's discovery requests and in their deposition testimony. Amir and Ayal also conceded liability on some of the Commission's claims during a conference with this Court. Summary judgment on claims premised on the Defendants' admissions is appropriate and would serve the interests of judicial economy by streamlining the further proceedings in this case.[1]

[1] The sought partial summary judgment would also allow Zvi and Amir to make good on their attorneys' assurances to Judge Gleeson during their sentencing, as described more fully in Parts IV and VII below.

STATEMENT OF FACTS

The relevant facts are set forth in Plaintiff's Rule 56.1 Statement of Undisputed Facts filed in support of this Motion ("Pl.56.1"). The key facts concerning each instance of insider trading at issue in this Motion are summarized in the corresponding sections of the Argument.

STANDARD OF REVIEW

Summary judgment is appropriate if the moving party demonstrates "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Once the plaintiff makes the required showing, the burden shifts to the defendant who "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586 (1986). To defeat a summary judgment motion, the opposing party "must come forward with 'specific facts showing that there is a *genuine issue for trial.*'" Id. at 587 (emphasis in the original).

The respective allocutions of Zvi, Amir and Ayal are admissible in this proceeding against each of them as party admissions under Fed. R. Evid. 801(d)(2). Each of the Defendants' and Heyman's allocutions is also admissible against any other Defendant under Fed. R. Evid. 803(22). See SEC v. Sekhri, 333 F. Supp. 2d 222, 228 n.8 (S.D.N.Y. 2004). Admissions made by Defendants in their Answers, discovery responses and depositions are similarly binding on them. See Nat'l Ass'n of Life Underwriters, Inc. v. Comm'r, 30 F.3d 1526, 1530 (D.C. Cir. 1994) (admissions in pleadings are binding); see also Fed. R. Civ. P. 8(b) (failure to deny an allegation constitutes an admission); Fed. R. Civ. P. 56(c) (summary judgment appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact").[2]

Finally, the statements made by counsel for Zvi and Amir at their sentencing hearing are admissible against those Defendants under Fed. R. Evid. 801(d)(2)(C) and (D) as statements authorized by them or made by their respective agents "concerning a matter within the scope of the agency or employment, made during the existence of the relationship." See also SEC v. Berger, 244 F. Supp. 2d 180, 189 (S.D.N.Y. 2001) (attributing statements made by defendant's counsel at plea hearing to defendant), aff'd, 322 F.3d 187 (2d Cir. 2003).

ARGUMENT

I. ZVI, AMIR AND AYAL ADMIT THAT THEY VIOLATED THE ANTI-FRAUD PROVISIONS OF THE EXCHANGE AND SECURITIES ACTS.

Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") makes it unlawful for any person to "use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance." 15 U.S.C. § 78j(b). Rule 10b-5, which implements Section 10(b), provides, in relevant part, that no person may "employ any device, scheme, or artifice to defraud . . . or . . . engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5.

Section 17(a) of the Securities Act of 1933 ("Securities Act") makes it "unlawful for any person in the offer or sale of any securities . . . (1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement [or omission] of a

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2 Because the Defendants were convicted of conspiracy, while the Commission's Complaint alleges securities fraud, the Commission is not seeking partial summary judgment on the grounds of collateral estoppel. See, e.g., SEC v. Monarch Funding Corp., 192 F.3d 295, 307 (2d Cir. 1999) (collateral estoppel may apply only when the issues in both proceedings are identical).

material fact . . .; or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a). Section 17(a) requires proof of "[e]ssentially the same elements" as are required under Section 10(b), "though no showing of scienter is required for the SEC to obtain an injunction under subsections (a)(2) or (a)(3)," Monarch Funding Corp., 192 F.3d at 308, and Section 17(a) is limited to conduct "in the offer or sale" of securities. 15 U.S.C. § 77q(a).

Of the four episodes of insider trading that are the subject of this Motion, only the illegal trading in advance of Taro's May 2001 CB Cream announcement did not include sales of securities on the basis of material nonpublic information.[3] The illegal trading ahead of Taro's July 2004 quarterly earnings announcement and on the Project Victor and Project AA merger tips included sales. Accordingly, the Defendants' conduct in connection with those three episodes violated Section 17(a) as well as Section 10(b) and Rule 10b-5.

A. Zvi and Amir Each Violated Section 10(b), Rule 10b-5 and Section 17(a) in Connection with Taro's July 2004 Quarterly Earnings Announcement.

In 2004, Zvi was Vice President of Materials Management and Logistics at Taro. Some time during the second quarter of 2004, in connection with his job, Zvi learned that Taro's earnings for that quarter would be disappointing. Zvi traded in Taro securities based on this information in his account with Israel Discount Bank and also communicated this information to his son Amir. Based on Zvi's tip, Amir traded in Taro securities in the account of Aragon Partners, LP ("Aragon"), a hedge fund that Amir had set up and controlled; in his wife Noga

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[3] In that episode, the sales came after the public disclosure of the information. The Defendants' violation, as more fully discussed below, arises out of purchase of securities while the material information was nonpublic.

Delshad's ("Noga") account; in his father-in-law Bahram Delshad's ("Delshad") account[4]; and in Zvi's Ameritrade account.[5] Amir further tipped his friend Heyman, and Heyman traded in Taro securities based on the tip. On July 29, 2004, Taro in fact announced disappointing earnings for the second quarter. Zvi, Aragon, Noga, Delshad and Heyman all realized substantial profits from Zvi's, Amir's and Heyman's trading ahead of the earnings announcement. (Pl.56.1 ¶¶ 9, 39-51.)

1. Zvi Is Liable as a Trader and as Amir's Tipper Under the Classical Theory.

Under the classical theory of insider trading, a corporate insider violates Section 10(b), Rule 10b-5 and Section 17(a) when he breaches his fiduciary duty to the corporation and its shareholders by using material non-public information about the company to attain a personal benefit, either by trading on the inside information himself or by tipping others so that they can trade on it. Dirks v. SEC, 463 U.S. 646, 654-55, 659 (1983). In this case, Zvi breached his fiduciary duty to Taro in two ways: he benefited himself by trading for his own account, and he tipped his son Amir so that Amir could profit from the breach.

Where the insider trades for his own account on the basis of nonpublic information, he indisputably violates the antifraud provisions by breaching his fiduciary duty. Where the insider tips another, he breaches his fiduciary duty if he intends to benefits from the tip. In determining the tipper's intention, "the SEC and the courts are not required to read the parties' minds." Id. at 663. Instead, the courts "focus on objective criteria," including the "relationship between the insider and the recipient of the information," which may "suggest[] a quid pro quo from the

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4 Delshad and the Commission staff have reached an agreement in principle, subject to Commission approval, to settle the Commission's claims against Delshad based on trading in his account in advance of the July 2004 earnings announcement.

5 For the purposes of this motion, the Commission accepts Amir's representation that he placed the charged trades in these accounts. (Brown Decl. Ex. 19, Interrogatory 10; Brown Decl. Ex. 20, Answer to Interrogatory 10.)

latter, or an intention to benefit the particular recipient." Id. at 663-64. Both the Supreme Court and the Second Circuit agree that in a case of a close personal relationship between the tipper and tippee, the benefit element is satisfied. Id. at 664 (a breach of duty exists "when an insider makes a gift of nonpublic information to a trading relative or friend"); SEC v. Warde, 151 F.3d 42, 48-49 (2d Cir. 1998) (tip to close friend established tipper's breach of fiduciary duty because "the 'benefit' element of § 10(b) is satisfied when the tipper "'intend[s] to benefit the . . . recipient'") (quoting Dirks, 463 U.S. at 664). As the Dirks Court explained, in those circumstances, "[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient." Dirks, 463 U.S. at 664.

Here, Zvi's admissions unequivocally establish that he violated Section 10(b), Rule 10b-5 and Section 17(a) in connection with Taro's July 2004 quarterly earnings announcement, both by trading on inside information himself and by improperly tipping Amir. Specifically, in his Answer, Zvi admitted that by virtue of his position, he had access to material, nonpublic information between February and June 2004 that showed the dismal quarter Taro was experiencing, and that by June 23, he knew that the quarter's actual sales would not meet the forecast. (Brown Decl. Ex. 1, ¶¶ 38 & 39; Brown Decl. Ex. 2, ¶ 16.)[6] Zvi also admitted that he traded on the material, nonpublic information. (Brown Decl. Ex. 1, ¶ 39; Brown Decl. Ex. 2, ¶ 16.) Consistently with this admission, Zvi's trading records show that, on June 28, 2004, he sold 10,000 shares of Taro stock from his account with Israel Discount Bank, avoiding losses of $238,698.76 from the drop in the stock price that followed the July 2004 earnings

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6 Citations to "Brown Decl. ¶__" and "Brown Decl. Ex.___" refer to the Declaration of Nancy A. Brown in Support of Plaintiff's Motion for Partial Summary Judgment, executed on September 30, 2008, and Exhibits thereto.

announcement. (Suh Decl. ¶¶ 2-3 & Ex. 1[7]; Brown Decl. Ex. 21, at 382-84; Brown Decl. Ex. 22; D'Avino Decl. Ex. 2.[8])

Zvi's breach of his obligation not to use confidential Taro information for personal benefit was willful. Zvi admits that he was aware of Taro policies that prohibited his June 28, 2004 trade, and that he violated them, both because Zvi placed the trade outside the quarterly ten-day window during which Taro allowed its employees to trade in Taro securities, and because, by Zvi's own admission, the trade was based on material non-public information about Taro. (Brown Decl. Ex. 2, ¶¶ 11-12; Brown Decl. Ex. 1, ¶¶ 27-28; Brown Decl. Ex. 21, at 97-98; Brown Decl. Ex. 23.) Thus, Zvi knew or was reckless in not knowing that, by using the inside information for his personal benefit, he was breaching his fiduciary duty.

Zvi's and Amir's admissions also unequivocally establish Zvi's intention to pass on the information to Amir so that Amir would benefit from it. In his plea allocution, Zvi stated:

> I was Vice President of Materials Management and Logistics for Taro Pharmaceuticals. Between 2001 and 2005, I disclosed material, non-public information concerning Taro to Amir Rosenthal, my son, knowing that with this information he may trade in Taro securities.

Judge Gleeson then asked Zvi if he "provided [his] son Amir with material, non-public information about the sales results of Taro in the second quarter of 2004," and Zvi responded, "Yes, sir." (Brown Decl. Ex. 6, at 43.) Zvi repeated these admissions in his Answer and Reponses to Interrogatories. (Brown Decl. Ex. 1, ¶¶ 38-39; Brown Decl. Ex. 2, ¶ 16; Brown Decl. Ex. 17, Interrogatory 3; Brown Decl. Ex. 18, Answer to Interrogatory 3.) Finally, as

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7 Citations to "Suh Decl. ¶__" and "Suh Decl. Ex. ___" refer to the Declaration of Simona K. Suh in Support of Plaintiff's Motion for Partial Summary Judgment, executed on September 30, 2008, and Exhibit thereto.

8 Citations to "D'Avino Decl. Ex. ___" refer to exhibits to the Declaration of James D'Avino in Support of Plaintiff's Motion for Partial Summary Judgment, executed on September 30, 2008.

discussed in detail in Part I.A.2. below, Amir admits that he bought and sold Taro securities based on Zvi's tip.

2. Amir Is Liable as Zvi's Tippee and as Heyman's Tipper Under the Classical Theory.

Zvi's and Amir's admissions show that Amir violated Section 10(b), Rule 10b-5 and Section 17(a) in connection with Taro's July 2004 earnings announcement, both by trading on Zvi's tip and by passing Zvi's tip on to Heyman, Amir's childhood friend. A tippee who knows or should know that the tipper has breached his fiduciary duty in disclosing material nonpublic information inherits the tipper's fiduciary duty and may not use the information for personal benefit without disclosing it to the public. Dirks, 463 U.S. at 659 (calling the tippee's duty "derivative" from the insider's duty). Thus, the tippee's trading violates the securities laws if (1) the tipper possessed material nonpublic information regarding his employer; (2) the tipper disclosed this information to the tippee; (3) the tipper benefited by the disclosure to the tippee; (4) the tippee traded in the employer's securities while in possession of that nonpublic information; and (5) the tippee knew or should have known that the tipper violated a relationship of trust by relaying the employer's information. Warde, 151 F.3d at 47. As noted above, to show that the tipper disclosed the information for personal benefit, the Commission is not required to prove that "the tipper expected or received a specific or tangible benefit in exchange for the tip." Id. at 48. The benefit to the tipper is established where the tipper intends to benefit the tippee by making a gift of the information. Id. at 48-49.

Zvi, Amir's tipper, admits that he possessed the relevant material nonpublic information and disclosed it to Amir for personal benefit and in breach of his fiduciary duty. (See Part I.A.1. supra.) Amir admits that he bought and sold Taro securities based on Zvi's tip, and that he knew that Zvi was breaching his fiduciary duty by passing the information on to him. Specifically, in his plea allocution, Amir stated:

> Judge Gleeson, the short of it is that I traded in Taro securities on material, non-public information that I received from my father, who was an employee at Taro. I know my father was breaching his fiduciary duty to Taro in giving me the information; that he intended for me to profit on the information; and that I was acting in violation of the securities law when I executed options trades and profited on that information. . . . And in July 2004, I traded on inside information about Taro's sales shortfall in the second quarter. The shortfall was not yet publicly announced when my father told me about it, and I traded.

(Brown Decl. Ex. 6, at 21.) Amir reiterated these admissions in his responses to the Commission's Requests for Admission ("RFA") and Interrogatories. (Brown Decl. Ex. 16, Response 3; Brown Decl. Ex. 19, Interrogatories 9 & 10; Brown Decl. Ex. 20, Answers to Interrogatories 9 & 10.) Amir also admitted that, based on Zvi's tip, he placed "[a]ll trades identified in the Amended Complaint for [this earnings announcement for the] Aragon account[,] Noga Delshad's account[,] Bahram Delshad's account[, and] Zvi Rosenthal's Ameritrade account." (Brown Decl. Ex. 19, Interrogatory 10; Brown Decl. Ex. 20, Answer to Interrogatory 10.)

Amir has also repeatedly admitted the additional facts that establish his liability as a tipper. In his plea allocution, in his Answer, and in his RFA and Interrogatory responses, Amir admitted tipping Heyman with the material nonpublic information that he had received from Zvi in advance of Taro's July 2004 earnings announcement. (Brown Decl. Ex. 6, at 21; Brown Decl. Ex. 3, ¶ 18; Brown Decl. Ex. 1, ¶ 39; Brown Decl. Ex. 16, Response 4; Brown Decl. Ex. 19, Interrogatories 9, 11 & 12; Brown Decl. Ex. 20, Answers to Interrogatories 9, 11 & 12.) In the RFA responses, Amir additionally admitted that he knew that Heyman would trade on the basis of Amir's tip, and that Heyman in fact traded on the basis of that tip. (Brown Decl. Ex. 16, Response 4.) Consistently with Amir's admissions, Heyman in his plea allocution and Answer admitted trading on material, nonpublic information provided by Amir in advance of Taro's July 2004 earnings announcement. (Brown Decl. Ex. 6, at 61; Brown Decl. Ex. 5, ¶ 10; Brown Decl. Ex. 1, ¶ 39.) In his Interrogatory responses, Amir further stated that he "[r]eceived approximately $4,000 cash from David Heyman from proceeds of his gains from the July 29, 2004 trades in return for material non-public information concerning Taro." (Brown Decl. Ex. 19, Interrogatory 13; Brown Decl. Ex. 20, Answer to Interrogatory 13.)

B. Zvi and Amir Each Violated Section 10(b) and Rule 10b-5 in Connection with Taro's May 2001 Announcement of FDA Approval of CB Cream.

Zvi's production and distribution responsibilities at Taro required that he be aware of the progress of the applications that Taro had made to the FDA for approval of new products. In weekly Product Launch meetings, and in his regular meetings with Taro's Director of Regulatory Affairs, Zvi was regularly informed about the company's changing estimates of the expected FDA approvals for new products. (Pl.56.1 ¶ 52.)

On May 29, 2001, Taro announced that the FDA had approved its application to distribute a new generic drug, CB Cream. Zvi was in charge of the production plan for CB Cream, and was responsible for ensuring that Taro manufactured and packaged sufficient stocks of CB Cream so that it was ready to ship to distributors and customers immediately upon FDA approval. By May 9, 2001, Taro employees involved in the product launch of CB Cream knew that FDA approval would most likely come by the first week of June 2001. On May 9, 2001, Taro learned in a conference call with the FDA that CB Cream was in "first generic drug review," which usually extends the FDA approval process by three to four weeks. (Pl.56.1 ¶¶ 53-54.)

Zvi tipped Amir about the upcoming FDA approval of CB Cream, and Amir traded on this information, generating profits of $118,797.87. (Pl.56.1 ¶¶ 55, 57.)

1. Zvi Is Liable as Amir's Tipper Under the Classical Theory.

Zvi's and Amir's admissions establish Zvi's violation of Section 10(b) and Rule 10b-5 as Amir's tipper in connection with Taro's May 29, 2001, announcement of CB Cream approval. First, in his Answer, Zvi admitted the Complaint's allegations about his possession of material nonpublic information about the status of Taro's FDA applications, both in general and specifically in connection with the CB Cream application. (Brown Decl. Ex. 1, ¶¶ 25, 44; Brown Decl. Ex. 2, ¶¶ 10, 18.)

Second, Amir has repeatedly admitted that Zvi provided him with material nonpublic information about the upcoming FDA approval of CB Cream. In his plea allocution, Amir stated:

> [I]n May 2001, I traded on inside information about the FDA approval of Taro's CB Cream application. The approval was not yet publicly announced when my father told me about it and I traded.

(Brown Decl. Ex. 6, at Plea Transcript at 21.) Amir repeated these admissions in his Answer and in his RFA and Interrogatory Responses. (Brown Decl. Ex. 3, ¶ 22; Brown Decl. Ex. 16, Response 6(a); Brown Decl. Ex. 19, Interrogatory 9; Brown Decl. Ex. 20, Answer to Interrogatory 9.)

Although Zvi has not expressly admitted providing material nonpublic information about CB Cream approval to Amir, either in the criminal proceeding against him or in this litigation, Amir's allocution admissions are admissible against Zvi. See Fed. R. Evid. 803(22). Moreover, Zvi's deposition testimony corroborates Amir's admissions. During his deposition, Zvi recounted the general circumstances of the tip almost exactly as described in Amir's Interrogatory responses – asking Amir to transport to Israel a piece of equipment that Taro needed to test to get the FDA approval. (Brown Decl. Ex. 21, at 91-94.) According to Amir, in connection with this request, Zvi also told Amir that the testing was necessary "as a last step before getting approval," and that Zvi "believe[d] that once the testing was done, approval should come shortly." (Brown Decl. Ex. 19, Interrogatory 9; Brown Decl. Ex. 20, Answer to Interrogatory 9.) Zvi claims not to remember what he told Amir at the time. (Brown Decl. Ex. 21, at 91-94.)[9]

Third, by disclosing material nonpublic information about CB Cream approval to Amir, Zvi violated his fiduciary duty. As discussed above, the benefit to the tipper and the resulting breach of fiduciary duty are established where the tipper makes a gift of confidential information to a trading relative. Dirks, 463 U.S. at 663-64; Warde, 151 F.3d at 48-49. Here, in the months leading up to the CB Cream announcement, Zvi knew that Amir was trading in securities. (Pl.56.1 ¶¶ 58-60.) In disclosing confidential Taro information to Amir, Zvi conveyed a gift to his son and thus violated his fiduciary obligations.

2. Amir Is Liable as Zvi's Tippee Under the Classical Theory.

In addition to the facts establishing Zvi's liability as a tipper, Amir has also repeatedly admitted the facts establishing his own liability as a tippee. As noted above, in his plea allocution, Amir admitted that he "traded on inside information about the FDA approval of Taro's CB Cream application," and that he knew that Zvi "was breaching his fiduciary duty to Taro in giving [him] the information." (Brown Decl. Ex. 6, at 21.) Amir's RFA and Interrogatory responses repeat these admissions. (Brown Decl. Ex. 16, Response 6; Brown Decl.

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9 That claim is highly suspect. During his allocution, Zvi broadly stated that he "disclosed material, non-public information concerning Taro to Amir," knowing that Amir may trade on it, "[b]etween 2001 and 2005." At Judge Gleeson's prompting, Zvi then added a specific admission about the 2004 tip. (Brown Decl. Ex. 6, at 43.) At his deposition, Zvi claimed that he had specified the 2001-2005 time frame only because that was the relevant period for the government's allegations, and because 2004 fell within that time frame. (Brown Decl. Ex. 21, at 84-85.) This after-the-fact attempt to alter the plain meaning of the allocution lacks all credibility and should be rejected.

Ex. 19, Interrogatories 9 & 10; Brown Decl. Ex. 20, Answers to Interrogatories 9 & 10.) As discussed in Part I.B.1. above, concerning Zvi's liability as a tipper, the two Defendants' admissions also establish the remaining elements of Amir's violation – Zvi's possession and disclosure of the material nonpublic information for personal benefit.

C. As They Concede, Ayal and Amir Violated Section 10(b), Rule 10b-5 and Section 17(a) in Connection with Project Victor and Project AA.

In May 2005, Ayal was employed at PwC and assigned to work on a confidential merger plan code-named Project Victor. PwC's client, a public company, was the target of the contemplated acquisition. Ayal told Amir about the merger plans and disclosed to Amir the identities of the companies involved, and, based on this tip, Amir sold the target company's puts in Aragon's trading account. Amir then tipped his law firm supervisor Young Kim, and Kim bought the target company's calls based on that tip. When Ayal learned that the merger plan was being abandoned, he again passed this confidential information to Amir, and Amir then liquidated Aragon's positions in the target company's securities. (Pl.56.1 ¶¶ 61-71.)

In April 2005, Amir's long-time friend Heyman was employed at E&Y and assigned to work on a confidential acquisition plan code-named Project AA, a public company client of E&Y that was considering acquiring another public company. Heyman disclosed the merger plan to Amir, and, based on Heyman's tip, Amir sold the target company's puts in Aragon's trading account. Amir then tipped Kim, and Kim bought the target company's calls. The merger did not occur. (Pl.56.1 ¶¶ 19, 72-77.)

During a conference with this Court on March 10, 2008, Ayal and Amir assured the Court that they would not contest their liability on the Commission's claims concerning Project Victor, and Amir's liability concerning Project AA. Among other things, Amir stated:

> If the SEC wants an injunction, you know, I'm fully aware that the likelihood that they'll get on [sic] in the end is extremely high. If they want to dispose of the two merger trades, the [Project Victor and Project AA] – and I think those are also five or six depositions they want to take – I'm willing to sign a consent for an injunction and they can, you know, drop those.
>
> Or if they want to just do a motion for summary judgment on those, you know, I'm not going to – I'm not going to oppose the underlying acts, if that's something they want to consider.

(Brown Decl. Ex. 15, at 14-15.) When counsel for the Commission then expressed her understanding that Ayal "was not willing to consent to an injunction on the merger trades," Ayal corrected her, stating:

> Well, Your Honor, I don't believe that's correct. . . . If there was simply a motion made on the [Project Victor] transaction that was based on the plea and the allocution, it would be very difficult for me to challenge.

(Brown Decl. Ex. 15, at 15.) When asked to estimate the time he would need to oppose the contemplated motion for partial summary judgment, Amir again assured the Court that, if the motion were

> only with respect to the two merger trades, then I'm not going to contest it at all. It'll just be – if there will be any argument, it would only be to the – any amount of penalty or whatever such things.

(Brown Decl. Ex. 15, at 16-17.)

In reliance on Amir's and Ayal's representations quoted above, the Commission did not take depositions of the third party witnesses relevant to its claims concerning Project Victor and Project AA, and did not expend the limited time it had to depose Defendants about those trades.

As detailed in the Commission's Statement of Undisputed Facts, Amir's and Ayal's March 10 concessions are abundantly supported by their own and Heyman's earlier admissions in plea allocutions and Answers, including Amir's admissions, in his Answer, concerning his role as Kim's tipper. (Pl.56.1 ¶¶ 23-25, 61-77.)[10] Accordingly, the Commission will not take up the Court's resources by arguing the merits of Ayal's and Amir's liability in connection with Project Victor and Project AA.[11]

II. DEFENDANTS ZVI, AMIR AND AYAL SHOULD BE PERMANENTLY ENJOINED FROM FURTHER VIOLATIONS OF THE SECURITIES LAWS.

The Court should permanently enjoin Zvi, Amir and Ayal from future violations of the federal securities laws. Section 20(b) of the Securities Act, 15 U.S.C. § 77t(b), and Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d), authorize such injunctive relief when (1) a defendant has violated the securities laws, and (2) the defendant is reasonably likely to violate the securities laws again in the future. SEC v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 99-100 (2d Cir. 1978). Here, Zvi, Amir and Ayal have each admitted conduct violating Section 10(b), Rule 10b-5 and Section 17(a), as detailed in Part I above, and each is likely to commit additional violations in the future.

In determining whether a reasonable likelihood exists that a defendant will commit future violations, courts recognize that "[f]raudulent past conduct can support an inference of a reasonable expectation of continued violations." SEC v. Musella, 748 F. Supp. 1028, 1042 (S.D.N.Y. 1989) (citing SEC v. Manor Nursing Ctrs., 458 F.2d 1082, 1100 (2d Cir 1972)), aff'd, 898 F.2d 138 (2d Cir. 1990). A court may also consider the degree of scienter involved; the isolated or recurrent nature of the infraction; whether the defendant has accepted responsibility

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10 With respect to Project Victor, Amir and Ayal are liable both under the misappropriation theory of insider trading, United States v. O'Hagan, 521 U.S. 642, 652-53 (1997), and under the classical theory of insider trading, in light of Ayal's status as PwC's client's temporary insider, Dirks, 463 U.S. at 655 n.14. With respect to Project AA, Amir is liable under the misappropriation theory.

11 If the Court grants Defendants an opportunity to rethink their concessions, the Commission respectfully requests an opportunity to brief Defendants' liability.

for his misconduct; and whether, because of his position or occupation, the defendant might be in a position to violate the securities laws again. SEC v. Cavanaugh, 155 F.3d 129, 135 (2d Cir. 1998).

Here, the undisputed facts support the issuance of a permanent injunction against Zvi, Amir and Ayal. First, Amir has already told the Court that he will not contest the imposition of an injunction against him on the basis of the Project Victor and Project AA trading alone. (Pl.56.1 ¶¶ 79.) Second, all three Defendants committed serious violations of securities laws. Prohibitions against insider trading are crucial to preserving the vitality of capital markets, because, as the Supreme Court explained in O'Hagan, "investors likely would hesitate to venture their capital in a market where trading based on misappropriated nonpublic information is unchecked by law." 521 U.S. at 658.

Third, Zvi's, Amir's and Ayal's violations involved high degrees of scienter. See Berger, 244 F. Supp. 2d at 193 (citing willful and knowing nature of defendant's misconduct as a factor in favor of injunctive relief). Zvi traded on material nonpublic information about Taro in violation of known Taro policies and also communicated material nonpublic information about Taro to Amir understanding that Amir would trade on it. (Pl.56.1 ¶¶ 42, 45, 58-60.) Amir knew or was reckless in not knowing that all three of his tippers – Zvi, Ayal and Heyman – tipped him in breach of their respective fiduciary duties, yet he traded on the tips and passed three of the four tips to others. (Pl.56.1 ¶¶ 47, 56, 71, 76; supra Part I.) Amir also understood that his trading on Zvi's tips violated securities laws. (Pl.56.1 ¶¶ 47, 56.) Ayal tipped Amir with material nonpublic information about the confidential merger plan even though he knew or was reckless in not knowing that he had the fiduciary obligation to keep the information confidential and that Amir would trade on the information. (Pl.56.1 ¶¶ 68-70.)

Fourth, the Defendants' violations were not isolated incidents. Zvi and Amir engaged in an insider trading scheme that included numerous trades ahead of two announcements occurring three years apart. Amir engaged in two other episodes of insider trading a year later. In such cases, courts have held that the infractions are recurrent and merit a permanent injunction. See, e.g., SEC v. Svoboda, 409 F. Supp. 2d 331, 343 (S.D.N.Y. 2006) (issuing permanent injunctions and finding that an insider trading scheme that lasted four years constituted "systematic wrongdoing"); SEC v. Freeman, 290 F. Supp. 2d 401, 405-07 (S.D.N.Y. 2003) (granting permanent injunction where defendant used inside information to trade securities on eight occasions over the course of approximately two years); SEC v. Sekhri, No. 98 Civ. 2320(RPP), 2002 WL 31100823, at *15 (S.D.N.Y. July 22, 2002) (granting permanent injunctions where defendants' insider trading scheme lasted more than one year and utilized confidential information on five corporate transactions).

Fifth, Amir's and Ayal's professional backgrounds and all three Defendants' history of active trading increase the likelihood of further violations.[12] As an attorney and an accountant, respectively (Pl.56.1 ¶¶ 10, 12), Amir and Ayal are both likely to have access to material nonpublic information in the future. Although Amir and Zvi cannot trade so long as they are in prison, their history of active investing makes it likely that, once released, they will return to trading. (Pl.56.1 ¶¶ 11, 60.) Ayal has been trading in securities for approximately eight years and still trades in mutual funds. (Pl.56.1 ¶ 13.)

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12 See Svoboda, 409 F. Supp. 2d at 343 (citing "defendants' familiarity with securities trading" as one of the reasons for permanently enjoining them from future violations of securities laws even though both had been sentenced to prison terms); Berger, 244 F. Supp. 2d at 193 (citing defendant's "history and experience in the securities markets" as a "reason to believe that [he] might attempt to return to investment activity in the future" and therefore one of the factors creating a "likelihood that, unless enjoined, [he] will continue to violate the federal securities laws").

Finally, despite their guilty pleas, the Defendants have demonstrated persistent unwillingness to accept full responsibility for their wrongdoing. For example, during his deposition, Zvi attempted to minimize the significance of his 2004 tip to Amir, describing the material nonpublic information that he passed on to Amir as mere "rumors," despite the fact that he admitted its materiality before Judge Gleeson. (Brown Decl. Ex. 21, at 120-123.)[13] Similarly unwilling to accept responsibility for his actions, Amir misled his potential employer, Dexia, about the circumstances of his departure from Thacher Proffitt, describing himself as having been "laid off," and concealing the existence of the criminal and Commission investigations of his trading. (Pl.56.1 ¶ 89.) In a most recent example of failure to accept responsibility, Ayal grossly understated the gravity of his own criminal conduct in an action he filed against New York University in which he challenges the University's refusal to confer his MBA degree because of his criminal conviction. In that complaint, he refers to the criminal case against him as merely a "legal problem arising out of the securities trading activities of his older brother"; describes the conspiracy charge to which he pled, a federal felony, as "one count of conscious avoidance of securities laws"; and portrays his criminal conduct as mere negligence, explaining that he pled guilty merely because he "realized that he should have anticipated that a very active trader like his brother might use [the merger] information." (Pl.56.1 ¶¶ 93-94.)

If these Defendants were to offer any assurance now against future violations, the Court should weigh such representations against the many acts of dishonesty and obfuscation each of them has admitted. (Pl.56.1 ¶¶ 82-92 (detailing Zvi's prior conviction for defrauding the federal government; Amir's document fabrication, admissions of forgery and of misrepresentations on employment applications and his application to the New York bar; and Ayal's contradictory

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13 As noted in footnote 9 above, Zvi also provided a highly suspect explanation of his own plea allocution, in substance attempting to retract one of his sworn admissions.

statements about Amir's access to Ayal's account and mischaracterization of his trading experience on account application).)

Defendants' insistence on litigating in this action matters to which they have already pled guilty in the criminal proceeding is perhaps the most certain indicator of their failure to appreciate the nature of their wrongdoing, and makes an injunction appropriate. Many courts have deemed an injunction appropriate in such circumstances because such conduct creates "a reasonable inference of a likelihood that [the defendant] may engage in future violations." Freeman, 290 F. Supp. 2d at 406; see also Svoboda, 409 F. Supp. 2d at 343; SEC v. McCaskey, No. 98 Civ. 6153 (SWK), 2001 WL 1029053, at *5 (S.D.N.Y. Sept. 6, 2001); cf. SEC v. Grossman, 887 F. Supp. 649, 660 (S.D.N.Y. 1995) (citing defendant's continued litigation of Commission's claims after guilty verdict in parallel criminal proceeding as one of the factors indicating likelihood of future violations), aff'd sub nom. SEC v. Estate of Hirshberg, 101 F.3d 109 (2d Cir. 1996).

III. DEFENDANTS ZVI, AMIR, AYAL AND OREN AND RELIEF DEFENDANTS EFRAT AND RIVKA SHOULD BE ORDERED TO DISGORGE THE AMOUNTS EARNED FROM THE UNLAWFUL TRADING.

Approximately half of the total illegal profits at issue in this motion, $962,905.58, was earned in 2004 in the trading account of Aragon, a hedge fund that Amir set up and controlled. Amir set up Aragon to pool and trade with funds previously kept in separate accounts of Rosenthal family members. The limited partners were Ayal, Oren, Efrat and Rivka; another entity controlled by Amir was the general partner. Amir controlled Aragon's operations and placed all trades in its trading account. After learning of the government's investigation of his trading, Amir liquidated positions in Aragon's trading account and distributed $2.5 million of proceeds to the partners. In May 2006, each of Amir, Ayal, Oren, Efrat and Rivka received a cash distribution of $500,000.00. (Pl.56.1 ¶¶ 14-18, 48.)[14]

A. The Illegal Profits Should Be Disgorged.

The power of this Court to award disgorgement derives from the full panoply of equitable powers conferred on it under the securities laws to "fashion an appropriate remedy." Manor Nursing Ctrs., 458 F.2d at 1103. Disgorgement is aimed at "forcing a defendant to give up the amount by which he was unjustly enriched," so that he will not "profit from [his] wrongdoing." SEC v. Tome, 833 F.2d 1086, 1096 (2d Cir. 1987).

The disgorgement amount need not be determined with exactitude; it need only be a reasonable approximation of profits causally connected to the violation, and any risk of uncertainty in calculating the amount "should fall on the wrongdoer." SEC v. Patel, 61 F.3d 137, 139, 140 (2d Cir. 1995). "[O]nce the SEC has made a reasonable showing of a defendant's illicit profits, the burden shifts to the defendant to show that the disgorgement figure was not a reasonable approximation." SEC v. Opulentica, LLC, 479 F. Supp. 2d 319, 330 (S.D.N.Y. 2007) (citing SEC v. First City Fin. Corp., Ltd., 890 F.2d 1215, 1232 (D.C. Cir. 1989)).

Here, the specific trades made on the basis of material nonpublic information are not in dispute. First, in his Interrogatory responses, Amir has specifically identified the trades that he placed based on Zvi's 2001 and 2004 tips as all the trades identified in the Complaint for those announcements for the accounts of Amir Rosenthal, Aragon, Noga Delshad, Bahram Delshad and for Zvi Rosenthal's Ameritrade account (Brown Decl. Ex. 19, Interrogatory 10; Brown Decl. Ex. 20, Answer to Interrogatory 10; Brown Decl. Ex. 1, ¶¶ 39 & 46.) Second, Zvi has admitted trading on material nonpublic information in advance of the July 2004 earnings announcement,

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14 Due to a typographical error, the Complaint incorrectly states that Rivka and Efrat received their distributions in May 2005. (Brown Decl. Ex. 1, ¶¶ 20 & 21.)

and Amir has admitted placing one of the two trades charged in the Complaint to Zvi's accounts in connection with this announcement. (Brown Decl. Ex. 2, ¶ 16; Brown Decl. Ex. 19, Interrogatory 10; Brown Decl. Ex. 20, Answer to Interrogatory 10; Brown Decl. Ex. 1, ¶ 39.) Thus, there can be no dispute that Zvi placed the second charged trade, Zvi's sale of 10,000 shares of Taro common stock on June 28, 2004, based on material nonpublic information, avoiding significant losses.[15] Third, in his plea allocution, Heyman stated that he traded in Taro options based on Amir's tip "[b]etween July 6, 2004 and July 14, 2004." (Brown Decl. Ex. 6, at 61.) The only Taro option trades executed in Heyman's account during that time period were the purchases of puts listed in paragraph 39 of the Complaint. (D'Avino Decl. Exs. 2 & 9.) Additionally, on July 6, 2004, in addition to the first purchase of Taro puts, Heyman sold Taro stock. (D'Avino Decl. Exs. 2 & 9.) Because of its timing, this trade also must have been based on Amir's tip.

Furthermore, the amounts of realized profits and avoided losses specified in the Complaint and in exhibits to the accompanying Declaration of James D'Avino are reasonable estimates of the profits that resulted from the illegal trades. The profits are the actual profits realized on the closing of the positions established ahead of the two announcements. The losses avoided through Zvi's and Heyman's sales of Taro stock ahead of the July 2004 earnings announcement were calculated by comparing the proceeds of those sales to the proceeds Zvi and Heyman would have received had they sold the stock on the first trading day after the announcement. (D'Avino Decl. Ex. 2.)

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15 During his deposition, Zvi claimed not to remember the circumstances of this trade. (Brown Decl. Ex. 21, at 382-84; Brown Decl. Ex. 22.)

B. Zvi and Amir are Each Jointly and Severally Liable for the Trading Profits of Their Tippees.

Zvi and Amir are each jointly and severally liable for the trading profits of their tippees. "A tippee's gains are attributable to the tipper, regardless whether benefit accrues to the tipper." Warde, 151 F.3d at 49; Grossman, 887 F. Supp. at 661. As the Second Circuit observed in Warde, the value of prohibitions against insider trading "would be virtually nullified if those in possession of [inside] information, although prohibited from trading for their own accounts, were free to use the inside information on trades to benefit their families, friends, and business associates." 151 F.3d at 49. Therefore, here, Zvi is liable, jointly and severally with Amir, for Amir's profits in connection with the CB Cream tip and for Amir's and Heyman's profits in connection with the July 2004 earnings tip, including the profits that Amir generated by trading on behalf of Aragon, Noga and Delshad. Similarly, Amir is liable for Heyman's profits in connection with the July 2004 tip.

C. Ayal, Oren, Efrat and Rivka Are Each Liable for 20% of Aragon's Illegal Profits Earned in Connection with Taro's July 2004 Quarterly Earnings Announcement.

Defendants Ayal and Oren and Relief Defendants Efrat and Rivka are each liable for his or her portion of the illegal profits that each received from Amir in distributions from Aragon, the vehicle Amir used to generate those profits. Each of them is liable for disgorgement as a recipient of the unlawful gains earned by Amir.

Because the Court has subject matter jurisdiction over the Commission's claims against the Defendants, it has the authority to grant the full panoply of equitable remedies so that the Commission can obtain complete relief. SEC v. Materia, 745 F.2d 197, 200 (2d Cir. 1984). An order of disgorgement may be entered "against a person who is not accused of wrongdoing in a securities enforcement action where that person: (1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds." Cavanaugh, 155 F.3d at 136. When proceeds of wrongdoing are transferred to a relief defendant without consideration, the relief defendant does not have a legitimate claim to the proceeds and must disgorge them. SEC v. Martino, 255 F. Supp. 2d 268, 290-91 (S.D.N.Y. 2003) (ordering relief defendants to turn over yacht bought with defendant's ill-gotten funds). As the Second Circuit explained in Cavanaugh, a contrary rule "would allow almost any defendant to circumvent the SEC's power to recapture fraud proceeds, by the simple procedure of giving stock to friends and relatives, without even their knowledge." 155 F.3d at 137; see also SEC v. Glauberman, No. 90 Civ. 5205 (MBM), 1992 WL 175270, at *1-2 (S.D.N.Y. July 16, 1992) (rejecting trust beneficiaries' objections to disgorgement remedy where court determined that defendant had deposited proceeds of insider trading into beneficiaries' account).

Here, Amir used the vehicle of Aragon to both generate the illegal profits and to distribute them to his siblings and mother. Ayal, Oren, Efrat and Rivka have no more legitimate claim to those profits than if they had received them directly from Amir himself. In SEC v. Antar, 831 F. Supp. 380 (D.N.J. 1993), a company insider illegally sold his company's stock through a custodial account set up in his children's names, based on material nonpublic information about the company's financial condition. Id. at 381-82. Because the insider dominated the custodial accounts, the court found that the custodial accounts were nothing more than "the means for him to carry out his fraudulent scheme," and ordered the children to disgorge the profits from the sales. Id. at 401 (quotation marks, alteration and citation omitted). In so ruling, the court noted that it need not determine whether the trader's gift of the original shares to the children had been effective, nor whether the children's mother "actually held title to the custodial stock as custodian for her five children." Id. at 382. The operative facts were simply that the trader had sold the shares on the basis of inside information, and the proceeds of that sale were now in the hands of his children:

> To allow [the children] to keep the illegal proceeds would give potential violators a blueprint for pursuing "estate planning" through securities fraud. Corporate managers could create the "custodial stock," falsify their company's financial results, and then sell the "custodial stock" at prices that are inflated by the fraudulent results. . . .
>
> The [children] cannot keep money that is not theirs. This Court has jurisdiction over illegal profits regardless of whether [the violator] fraudulently traded for himself or, instead, generated the illegal profits for his children by using an "estate planning device" that he created.

Id. at 400-01. Accordingly, the court held that the insider's children had no legitimate claim to the illegal profits from the stock sale. Id.

Nor must the Commission trace the dollars earned by trading ahead of the July 2004 earnings announcements to those distributed by Amir in May 2006. In a similar case, where the insider trading violator not only traded in securities in his children's custodial account, but also transferred his own money to that account, the court held that the Commission's disgorgement remedy would not be limited to those dollars directly traceable to the violator's profits. The children would be required to disgorge the money that the trader had funneled to them as well:

> [T]he funds in question were placed in the accounts either at the time [the violator] was making insider profits, or shortly afterward when [the violator] knew the SEC was on his trail. When [the violator's] total disgorgement liability exceeds his net worth, he cannot take refuge in having commingled his profits with other personal funds before he transferred funds to his children's accounts.

Glauberman, 1992 WL 175270, at *2. In this case, Amir continued to trade in Aragon's account after July 2004, and only distributed the proceeds of the account after he knew of the Commission's investigation. His responsibility to disgorge the full extent of the benefit he unlawfully accrued should not be lessened because he commingled the illegal proceeds with other funds prior to distributing them to his siblings and mother.[16]

Aragon's illicit profits from Amir's trading ahead of the July 2004 earnings announcement, $962,905.58, were distributed to each of Aragon's partners in May 2006, when Amir, Ayal, Oren, Efrat and Rivka each received $500,000. (Pl.56.1 ¶¶ 17-18, 48.) Because they had no legitimate claims to their portions of the illegal profits, Ayal, Oren, Efrat and Rivka are each liable for one-fifth of the total profit amount, or $192,581.12.

Exhibits 1 and 2 attached to the accompanying declaration of James D'Avino, a member of the Commission staff, reflect the amounts which each Defendant or Relief Defendant should disgorge.

IV. PREJUDGMENT INTEREST SHOULD BE ORDERED ON THE DISGORGED AMOUNTS.

Prejudgment interest should be awarded on all of the disgorged amounts. Awarding prejudgment interest deprives defendants of the time value of their ill-gotten gains, and is a proper exercise of judicial discretion in Commission cases. Warde, 151 F.3d at 50; SEC v. Stephenson, 732 F. Supp. 438, 439 (S.D.N.Y. 1990). "'Requiring payment of interest prevents a defendant from obtaining the benefit of what amounts to an interest free loan procured as a result of illegal activity.'" SEC v. Haligiannis, 470 F. Supp. 2d 373, 385 (S.D.N.Y. 2007) (quoting SEC v. Moran, 944 F. Supp. 286, 295 (S.D.N.Y. 1996)).

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[16] Amir's siblings and mother are liable for disgorgement of the profits distributed to them irrespective of the amounts they may originally have contributed to Amir through Aragon. While the Commission intends to establish that the contributions themselves were profits from earlier insider trading by Amir, his father and brothers, it need not do so for the purposes of this motion. Even if those contributions were legitimate, Amir's commingling of them with illicit profits taints the entire pool of money. SEC v. The Better Life Club of Am., Inc., 995 F. Supp. 167, 181 (D.D.C. 1998), aff'd, 203 F.3d 54 (D.C. Cir. 1999) (where legitimate proceeds are commingled with illegitimate ones, investors have an equitable interest in all the funds, and that interest defeats relief defendants' claim to distributions out of the commingled funds).

An award of prejudgment interest is particularly appropriate in this case because Zvi and Amir used this litigation to delay paying a liability they acknowledged approximately a year and a half ago. During Zvi's and Amir's sentencing, Judge Gleeson expressed his concern that the Government had not sought a restitution order. In response to questions raised by the Court, Zvi's and Amir's attorneys each assured Judge Gleeson that both disgorgement and penalties would be awarded in the Commission's action, making a restitution order in the criminal case unnecessary. On the basis of those assurances, Judge Gleeson did not order restitution as part of Zvi's or Amir's sentence. (Pl.56.1 ¶¶ 26-31, 33.) Zvi and Amir should not be allowed to keep the time value of their ill-gotten gains, which, but for their counsel's assurances about the likely outcome of this litigation, they probably would have been ordered to pay as part of their criminal sentences.

The accompanying declaration of James D'Avino, and Exhibits 1 and 3 thereto, reflect the amounts of prejudgment interest for which each Defendant or Relief Defendant is liable.[17] (D'Avino Decl. ¶ 4 & Exs. 1 & 3.)

V. CIVIL PENALTIES SHOULD BE ORDERED AGAINST ZVI, AMIR AND AYAL.

A. Maximum Penalties Under ITSFEA Should Be Ordered Against Zvi and Amir for Their Violations in Connection with Taro's July 2004 Earnings Announcement.

Section 21A of the Insider Trading and Securities Fraud Enforcement Act ("ITSFEA"), authorizes a District Court to impose a penalty of up to "three times the profit gained or loss

[17] Prejudgment interest is typically calculated at the IRS underpayment rate because "'that rate reflects what it would have cost to borrow the money from the government and therefore reasonably approximates one of the benefits the defendant derived from the fraud.'" Haligiannis, 470 F. Supp. 2d at 385 (quoting SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1476 (2d Cir. 1996)).

avoided" by a defendant's insider trading. 15 U.S.C. §§ 78u-1(a)(1), (a)(2).[18] Tippers' penalties are based on their own profits and those of their tippees. See, e.g., Sekhri, 2002 WL 31100823, at *17 -19. Congress added the penalty provision to provide the necessary deterrent not accomplished by the disgorgement remedy alone. "[D]isgorgement alone 'merely restores a defendant to his original position without extracting a real penalty for his illegal behavior.'" Id. at *18 (quoting H.R. Rep. No. 98-355, 98th Cong., 2d Sess., 7-8 (1984), reprinted in 1984 U.S.C.C.A.N. 2274, 2280-81).

In determining penalties, courts in this District consider "'the defendant's culpability, the amount of profits gained, the repetitive nature of the unlawful act and the deterrent effect of a penalty given the defendant's net worth.'" Svoboda, 409 F. Supp. 2d at 347 (quoting Sekhri, 2002 WL 31100823, at *18). Penalties are especially appropriate where the defendants executed multiple trades on inside information and demonstrated a high degree of intent. Svoboda, 409 F. Supp. 2d at 347 (citing Sekhri, 2002 WL 31100823, at *18-*19); Freeman, 290 F. Supp. 2d at 406, 407 (imposing penalty equal to illicit gain amount where defendant's trading "occurred in a continuous and systematic pattern spanning over two years[,] . . . exhibit[ing] a high degree of culpable intent"); SEC v. Falbo, 14 F. Supp. 2d 508, 528-29 (S.D.N.Y. 1998) (imposing a $50,000 penalty on insider trader who concealed trades using others' accounts and tipped others).

Additionally, the deterrent effect of the penalties becomes particularly important when a defendant refuses to accept full responsibility for his or her violations. "The criminal who in the teeth of the evidence insists that he is innocent, that indeed not the victims of his crime but he himself is the injured party, demonstrates by his obduracy the likelihood that he will repeat his crime, and this justifies the imposition of a harsher penalty on him." SEC v. Lipson, 278 F.3d 656, 664 (7th Cir. 2002).

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[18] The Commission does not seek penalties for Amir's trading ahead of the CB Cream announcement because the conduct occurred beyond the five-year statute of limitations period. 15 U.S.C. § 78u-1(d)(5). The Commission does not seek penalties under ITSFEA for the Project Victor and Project AA violations because the illegal trades were not profitable.

Here, all relevant factors militate in favor of maximum penalties against Zvi and Amir. Neither Defendant's culpability is in dispute. Indeed, Amir's own counsel stated during his sentencing that, in the Commission's present action, there would be "no liability issue." (Pl.56.1 ¶ 27.) The illicit trading profits that resulted from the 2004 violations equaled $1,774,818.40 for Zvi and $1,536,119.64 for Amir. (Pl.56.1 ¶¶ 44, 48; D'Avino Decl. Ex. 2.) As discussed in detail in Part II above, each Defendant willfully violated securities laws on more than one occasion, both by trading himself and by tipping others; each has admitted to dishonest conduct on other occasions; and each has demonstrated unwillingness to take full responsibility for his misconduct. Accordingly, for their violations in connection with the July 2004 earnings announcement, Zvi and Amir should each be ordered to pay penalties in the amounts equal to three times the illegal profits, or $5,324,455.20 and $4,608,358.92, respectively. (D'Avino Decl. Ex. 1.)

B. Third-Tier Penalties Under Section 21(d)(3) of the Exchange Act Should Be Ordered Against Amir for His Violations in Connection with His Project Victor and Project AA Trading and Against Ayal for His Violations in Connection with Project Victor.

Because the Project Victor and Project AA mergers did not occur, the illegal trading based on those tips did not result in profits. Nevertheless, under Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78u(d)(3), Amir and Ayal should each be ordered to pay third-tier penalties per violation for their conduct in connection with these tips.

1. **Section 21(d)(3) Applies to Amir's and Ayal's Violations in Connection with Projects Victor and AA.**

Section 21(d)(3) of the Exchange Act authorizes a District Court to assess civil penalties against any person who violates the Exchange Act or rules and regulations thereunder "other than by committing a violation subject to a penalty pursuant to [Section 21A of the Exchange Act]." 15 U.S.C. § 78u(d)(3)(A). Here, the Defendants' violations in connection with Projects Victor and AA are not "violation[s] subject to a penalty pursuant to [Section 21A]" because these violations did not result in profits. Accordingly, Section 21(d)(3) applies.[19]

Amir's and his tippee Kim's fortuitous failure to profit from their violations does not insulate Amir and Ayal from penalties under Section 21(d)(3). By its terms, Section 21(d)(3) applies to all violations of the Exchange Act, regardless of whether those violations were profitable. As the Second Circuit noted in United States v. Carpenter, 791 F.2d 1024, 1032 n.8 (2d Cir. 1986), "a fraudulent scheme need not be foolproof to constitute a violation of Rule 10b-5. It is enough that [defendants] reasonably expected to and generally did reap profits by trading on the basis of material, nonpublic information." See also Kuehnert v. Texstar Corp., 412 F.2d 700, 704 (5th Cir. 1969) ("The Commission may act under sections 17(a)(1) and 17(a)(3) of the Securities Act of 1933 and under 10(b), involved here, to enjoin a potential fraud or prosecute a fraud that failed, without proof of actual loss to any victim.") (citations omitted). Indeed, as one court has concluded, where there are no ill-gotten gains to disgorge, penalties are "especially appropriate to further the deterrence goals of the securities laws." SEC v. McCaskey, No. 98

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19 The Commission has previously obtained penalties under Section 21(d)(3) in settled insider trading cases, including the settlement with Young Kim in this case. (Brown Decl. Ex. 13.) See also SEC v. Tsao, No. AW-03-1596 (D. Md.), Lit. Rel. No. 18889, 83 SEC Docket 2460, 2004 WL 2076220 (Sept. 17, 2004); SEC v. Schuster, No. 00 Civ. 8822, Lit. Rel. No. 16939, 2001 WL 278472 (Mar. 22, 2001).

Civ. 6153 (SWK)(AJP), 2002 WL 850001, at *14 (Mar. 26, 2002) (awarding third-tier penalties even though the defendant's conduct had produced no illicit profits).

2. Third-Tier Penalties Are Appropriate.

Section 21(d)(3) creates a three-tiered penalties scheme, under which the highest, third-tier penalties may be awarded for violations that involve "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and that "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." 15 U.S.C. § 78u(d)(3)(B)(iii).[20] By their own admissions, Amir's and Ayal's violations in connection with Projects Victor and AA involved fraud and deceit. (Pl.56.1 ¶¶ 23-24, 68-71, 76.) The trades based on the illegal merger tips also created a significant risk of substantial losses to others. For example, Amir's trading on the Project Victor and Project AA merger tips exposed his trading counterparties to the risk of losses of up to approximately $54,000 and $68,000, respectively. (D'Avino Decl. Ex. 2.) Accordingly, third-tier penalties are appropriate.

For a natural person, the maximum penalty for each third-tier violation is the greater of $120,000 or "the gross amount of [the person's] pecuniary gain as a result of the violation." Id.; 17 C.F.R. § 201.1002, Table II to Subpart E (adjusting the penalties awardable under § 78u(d)(3) for inflation, as required by the Debt Collection Improvement Act of 1996).[21] "The amount of the penalty shall be determined by the court in light of the facts and circumstances." 15 U.S.C. § 78u(d)(3)(B)(i). In assessing the amount of the penalty, courts have considered the following

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20 First-tier violations are violations without any additional qualifications; second-tier violations are those involving "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement." 15 U.S.C. §§ 78u(d)(3)(B)(i) & (ii).

21 The maximum penalty for first-tier violations is $6,500 per violation, and the maximum penalty for second-tier violations is $60,000 per violation.

factors: "(1) the egregiousness of the defendant's violations; (2) the level of scienter involved; (3) the repeated nature of the violations; (4) the defendant's willingness to admit his wrongdoing; (5) the losses or risk of loss the defendant's misconduct caused to others; (6) the defendant's cooperation and honesty with the authorities; and (7) the defendant's current and future financial situation." SEC v. Zwick, No. 03 Civ. 2742 (JGK), 2007 WL 831812, at *26 (S.D.N.Y. Mar. 16, 2007), aff'd, No. 07-2088, 2008 WL 4104233 (2d Cir. Aug. 27, 2008); see also SEC v. Michel, No. 06 C 3166, 2008 WL 516369, at *3 (N.D. Ill. Feb. 22, 2008) (imposing a penalty of one-and-a half times the profits subject to disgorgement despite defendant's "present lack of income" and "numerous debts," in part because the defendant was "an educated, 37-year-old man who will likely find another line of work"). With respect to the first four of these factors, the same facts that support the entry of an injunction in this case support the award of third-tier penalties. (See Part II supra.) As noted above, the Defendants' conduct created substantial risk of loss to others. In the Commission's investigation, the Defendants all asserted their Fifth Amendment privileges to document subpoenas and in testimony, and cooperated only by pleading guilty in the criminal case against them. (Brown Decl. ¶ 47.) Finally, although their criminal convictions may have impaired Amir's and Ayal's employment opportunities, both are young, intelligent and well-educated, and there is little doubt that each will ultimately be able to earn a substantial income.

Accordingly, Ayal and Amir should each be ordered to pay third-tier penalties of $120,000 per violation. Ayal should be ordered to pay $240,000, because he illegally tipped Amir twice – first, about the planned Project Victor merger, and then about the cancellation of the plan. Amir should be ordered to pay $600,000, because he illegally traded on three tips – two tips from Ayal and one from Heyman, – and twice illegally tipped Kim.

VI. THE COURT SHOULD BAR ZVI FROM SERVING AS AN OFFICER OR DIRECTOR OF A PUBLIC COMPANY.

Zvi should be permanently barred from acting as an officer or director of any public company. Under Section 21(d)(2) of the Exchange Act, a court may bar or suspend a person from serving as an officer or director of a public company if he has violated Section 10(b) or the rules and regulations thereunder, and that "person's conduct demonstrates unfitness to serve as an officer or director." 15 U.S.C. § 78u(d)(2). Officer-and-director bars are "especially appropriate in cases in which a defendant has engaged in fraudulent conduct while serving in a corporate or other fiduciary capacity." SEC v. Drexel Burnham Lambert Inc., 837 F. Supp. 587, 613 (S.D.N.Y. 1993) (quoting S. Rep. No. 337, 101st Cong., 2d Sess. 22, at 22 (1990)).

The Second Circuit has described six non-exclusive factors that a court may consider when determining whether to impose an officer-and-director bar and the duration of such a bar: "(1) the 'egregiousness' of the underlying securities law violation; (2) the defendant's 'repeat offender' status; (3) the defendant's 'role' or position when he engaged in the fraud; (4) the defendant's degree of scienter; (5) the defendant's economic stake in the violation; and (6) the likelihood that misconduct will recur." Patel, 61 F.3d at 141. A district court has substantial discretion in determining whether to impose an officer-and-director bar, and may impose the bar even if not all the Patel factors are present. Id.

Here, the Patel factors militate in favor of a permanent bar. Zvi was Taro's Vice President of Materials Management and Logistics, a critical position within Taro's upper management. (Pl.56.1 ¶ 9.) To enable Zvi to perform his responsibilities, Taro entrusted him with important and highly confidential information, including information about Taro's current sales and the status of its FDA applications. (Pl.56.1 ¶¶ 39, 52, 54.) Zvi repeatedly abused that trust by trading on the entrusted information himself in 2004 and by tipping his son Amir with the entrusted information twice, in 2001 and 2004. Zvi's violations were serious and intentional. (See Parts I.A.1. and I.B.1. supra.)

Furthermore, Zvi's financial stake in his violations was substantial. In 2004, Zvi avoided losses of $238,698.76 through his own illegal trading and realized gains of $31,143.27 from Amir's illegal trading in Zvi's account. (D'Avino Decl. Ex. 2.) Amir's 2001 and 2004 trading on Zvi's tips resulted in over one million of illegal profits for Zvi's wife and children, either directly, from trades in Amir's own brokerage account, or indirectly, from trading in the accounts of Amir's wife Noga and Aragon. (D'Avino Decl. Ex. 2.)

Finally, recurrence of Zvi's violations is likely because of his history of illegal and dishonest conduct, most significantly, his prior conviction. In that case, too, in his capacity as a corporate manager, Zvi engaged in criminal conduct and then apparently acknowledged his wrongdoing in his plea. At sentencing in that case, Zvi benefited from a downward departure based on what the court found to be the aberrant nature of the criminal behavior. (Pl.56.1 ¶¶ 82-83.) The events at issue in this motion show that Zvi's criminal conduct was no aberration, and that he should not be allowed to be an officer or director of a public company after he completes his current sentence. Cf. McCaskey, 2001 WL 1029053, at *6-*7 (imposing a six-year officer-and-director bar in part because of a prior arbitration award against defendant for unauthorized trading).

VII. FINAL JUDGMENT SHOULD BE ENTERED.

The Court should enter final judgment against Zvi, Amir, Ayal, Oren, Efrat and Rivka on the claims established here under Fed. R. Civ. P. 54(b).

There are three requirements for entering a final judgment under Rule 54(b). First, as here, the case must involve multiple claims or multiple parties. Ginett v. Computer Task Group, 962 F.2d 1085, 1091 (2d Cir. 1992). Second, at least one claim must be finally decided within the meaning of 28 U.S.C. § 1291. Id. A claim is deemed finally decided "[i]f the decision 'ends the litigation [of that claim] on the merits and leaves nothing for the court to do but execute the judgment' entered on that claim." Id. at 1092 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978)). This requirement is also met here. The sought partial summary judgment will end litigation of all claims at issue in this motion on the merits, and will leave nothing for this Court to do but execute the judgment.

Third, "the district court must make 'an express determination that there is no just reason for delay' and expressly direct the clerk to enter judgment." Ginett, 962 F.2d at 1091 (quoting Fed. R. Civ. P. 54(b)). This determination is within the discretion of a district court, and "[o]nly those claims [that are] 'inherently inseparable' from or 'inextricably interrelated' to each other are inappropriate for rule 54(b) certification." Id. at 1096. Such close relationship between claims exists when "(1) [the appellate court reviewing the decided claims] would necessarily have to reach the merits of one or more [of the remaining claims] and/or (2) the district court's disposition of one of more of the remaining claims could render [the appellate court's] opinion advisory or moot." Id. at 1095. Even if a decided claim is based on the same operative facts as a remaining claim, partial judgment under Rule 54(b) on the decided claim may be entered if the two claims are independent of each other. United States v. B.C.F. Oil Refining Inc., CV-05-0562, 2007 WL 81933, at *4 (E.D.N.Y. Jan. 9, 2007) (concluding that partial judgment for plaintiff should be entered on the decided claim where a remaining claim was based on the same operative facts but defendant's liability on one did not affect its liability on the other).

Here, there is no just reason to delay the entry of judgment. The claims at issue in this motion are clearly "separable" and "extricable" from the remaining claims in this case. The sought partial summary judgment will complete this litigation with respect to these Defendants' liability for the events surrounding the July 2004 Taro earnings tip and the Project Victor and Project AA merger tips. With respect to the events surrounding the CB Cream tip, the litigation will be complete as to Zvi and Amir, and only the insider trading claim against Ayal will remain in the case. The contested aspects of that claim, however, are Ayal's receipt of a tip from Amir of Taro insider information and Ayal's trading on it.[22] There is no dispute about either Zvi's access to the relevant material nonpublic information or Amir's receipt of that information and trading on it. All other claims remaining in this case arise out of episodes of insider trading that are separate from – and occurred at times different from – the events at issue in this motion. If an appellate court were to review the Court's partial judgment, it would not need to consider events relevant to the remaining claims, nor can the resolution of the remaining claims render that appellate court's decision moot.

The entry of final judgment under Rule 54(b) will protect the Commission's ability to collect its judgment without further delay. Courts reviewing Rule 54(b) applications routinely consider the effect of delay on the prevailing claimant's ability to obtain the granted relief. See Ginett, 962 F.2d at 1097 ("If [plaintiff] is legally entitled to a judgment on his severance pay claim, he should be able to execute upon it now, and should not be penalized for combining his separate claims against [defendant] in one complaint."); Lankler Siffert & Wohl, LLP v. Rossi, 02 Civ. 10055 (RWS), 2004 WL 541842, at *5 (S.D.N.Y. Mar. 19, 2004) (granting Rule 54(b) certification in part because plaintiffs had already "been waiting for over a year and a half for payment of substantial sums"), aff'd, 125 F. App'x. 371 (2d Cir. 2005). Where assets supporting the judgment are dissipating, certification is especially important because judgment delayed may

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22 The same would be true of the Commission's claims against Delshad for the July 2004 trading in his account, if those claims are not ultimately settled.

be judgment denied. E.g., Capital Distrib. Servs., Ltd., v. Ducor Express Airlines, Inc., 462 F. Supp. 2d 354, 359 (E.D.N.Y. 2006) (granting Rule 54(b) certification when the judgment would be paid from real estate properties, and the market for those properties was weakening).

Here, a final judgment under Rule 54(b) will enable the Commission to collect the amounts that Zvi and Amir pledged to pay long ago. Although more than a year has passed since Zvi and Amir assured Judge Gleeson that a restitution order would be unnecessary (Pl.56.1 ¶¶ 26-29), Defendants have yet to disgorge their illegal profits. Additionally, the assets from which the Commission's judgment would be satisfied are currently under the control of Defendants or Relief Defendants. If final judgment is not certified, the Defendants and Relief will have continued use of the ill-gotten gains for their expenses, making full recovery at the end of a trial on the remaining claims unlikely and guaranteeing that Defendants and their family members will have profited from their wrong-doing.

CONCLUSION

For all the foregoing reasons, the Commission's motion for partial summary judgment should be granted, and judgment on the relevant claims addressed herein should be entered.

Dated: New York, New York
October 1, 2008

Respectfully submitted,

SECURITIES AND EXCHANGE COMMISSION

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